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No. 83-159

# In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS E. GREENMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioner is entitled to specific performance of a plea agreement when the sentencing court rejected the agreement and petitioner thereafter nevertheless pleaded guilty with full knowledge of an alleged breach of the agreement by the government.

2. Whether the district court failed to give impartial consideration to petitioner's submissions at the sentencing proceeding.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 700 F.2d 1377.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1983 (Pet. App. 1a-11a). A petition for rehearing was denied on April 28, 1983 (Pet. App. 12a-13a). On June 23, 1983, Justice Powell extended the time for filing a petition for a writ of certiorari to July 27, 1983, and the petition was filed on that date (Pet. App. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Between 1977 and 1981, petitioner operated a criminal scheme that defrauded investors of millions of dollars (Pet. App. 2a; see Pet. 6). After surrendering to the authorities, petitioner entered into a plea agreement that required him to make restitution and to plead guilty to a single count of

causing a person to travel in interstate commerce in furtherance of a scheme to defraud investors of $5,000 or more, in violation of 18 U.S.C. 2314. In return, the agreement specified: "Defendant and the DOJ [Department of Justice] further agree that the DOJ shall make no recommendation as to the sentence, if any, to be imposed upon Defendant." The agreement also specified that "in the event the Court otherwise rejects this agreement, Defendant shall then be given an opportunity to withdraw his plea of guilty." This plea agreement began with the clause: "Defendant DENNIS E. GREENMAN and the UNITED STATES DEPARTMENT OF JUSTICE (DOJ) mutually agree as follows:". Pet. App. 32a-33a; Information.[1]

The United States District Court for the Middle District of Florida provisionally accepted petitioner's guilty plea, explicitly noting that it wished to review the presentence report before deciding whether to accept the plea agreement. During the presentence investigation, officials of the Securities and Exchange Commission wrote a letter to the court in which they described petitioner's offense and suggested that the court impose a sentence that would be sufficient for deterrent purposes. The letter did not suggest any specific sentence. Pet. App. 3a, 41a-42a.

After reviewing the presentence report, the district judge announced that he had decided to reject the plea agreement (Pet. App. 44a). He explained that he believed the government's decision to prosecute petitioner on only one count was too lenient and that he did not want to give that decision a "judicial imprimatur" (*id.* at 3a-4a, 45a). The district judge stated that he had read the SEC letter but added: "I had made the decision to reject the plea agreement

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[1]The one-page Information appears in the Record Excerpts filed in the court of appeals.

before I saw anything from the SEC" (*id.* at 46a-47a). The court offered petitioner an opportunity to withdraw his guilty plea (*id.* at 45a).

Petitioner sought a continuance and, two weeks later, moved to transfer the case to another judge. The district court denied the motion, explaining:

> [T]his plea agreement, as far as I'm concerned, has not been breached. It's clearly the intent of the U.S. Attorney only to bind the Department of Justice, and I don't think that carries forward to the Securities and Exchange Commission. And even if it did, they have not recommended any sentence.

Petitioner then explicitly declined to withdraw his guilty plea. Pet. App. 49a-50a, 57a-58a.

Before imposing sentence, the district court invited petitioner to correct errors in the presentence report. Petitioner's counsel referred to alleged inaccuracies in the SEC letter and noted his view that the letter should not have been considered by the court. The district judge then said: "I had made a decision to reject the plea agreement before even looking at [the letters] and had already made a decision as to what the sentence should be in this case if * * * the defendant decide[d] not to withdraw the plea of guilty." Pet. App. 49a-50a, 58a-60a; 1/28/82 Tr. 12-13, 15-25.

Following statements by petitioner's counsel and petitioner, the district court imposed the maximum sentence of 10 years' imprisonment and a fine of $10,000 (Pet. App. 60a-61a). The court explained its reasons for imposing this sentence (1/28/82 Tr. 26-27):

> I think [it] would be a mockery of justice if this Court were to enter a probated sentence of this man with the many victims who have suffered so much from the enormity of this crime.

> I really think it would hamper our judicial process and cause — it's the type of thing that would be one more nail in a breakdown of our judicial process. * * *
>
> But hopefully, it will be some message to someone else who will be in a similar position to Mr. Greenman that this cannot be allowed. Society is not going to allow it and if they commit acts such as this, they are going to be penalized severely by going to prison.

The court of appeals affirmed. It reasoned (Pet. App. 7a-8a):

> [Petitioner] chose to plead guilty while fully aware of the alleged breach of his plea bargain. * * * Therefore, [petitioner] cannot argue now that his guilty plea was conditioned on any unfulfilled promise of the prosecution. He entered his plea voluntarily and fully aware of all relevant circumstances and the possible consequences. We can find no support for the proposition that a broken plea agreement must be specifically enforced when the guilty plea was entered with knowledge of the alleged breach.

The court of appeals also rejected petitioner's contention that the district court was not impartial during the sentencing proceedings (*id.* at 9a-11a).

## ARGUMENT

1. a. It is entirely clear that the guilty plea on the basis of which petitioner was sentenced was entered voluntarily and intelligently. As the court of appeals noted, petitioner had a full opportunity to withdraw his earlier plea, and he made his decision not to do so knowing that the SEC letter was before the district court. Since the district court had rejected the plea agreement, it was unquestionably free to consider any government recommendations in sentencing petitioner. Indeed, when petitioner decided to adhere to his guilty plea,

he had far more knowledge about the sentencing judge's inclinations than most defendants have when they decide whether to plead guilty.

Petitioner nonetheless seeks relief on the ground that the government breached the plea agreement that was rejected by the district court. Petitioner's contention is without merit for several reasons.

First, as the district court found, the government did not violate the terms of the plea agreement in any way. It is apparent from the face of the agreement that it was carefully drawn to be between petitioner and the Department of Justice alone. Only the Department of Justice promised not to make a sentencing recommendation, and petitioner does not suggest that the Department made such a recommendation.[2]

Even if the agreement were not construed specifically to leave the SEC free to make a recommendation, the most that can be said is that there was no meeting of the minds on the question whether government agencies other than the Department of Justice could make recommendations to the sentencing court. That defect might have entitled petitioner to have the agreement rescinded — that is, to withdraw his plea, which he chose not to do — but it cannot entitle him to specific performance. In any event, the district court found that even the SEC letter was not a "recommendation as to the sentence" (Pet. App. 33a) within the meaning of the plea agreement.

Second, even assuming that the government breached the plea agreement, that agreement fell through not because of any action by the government but because the district court

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[2]Petitioner does not appear to contend that the SEC letter was written at the instigation of the Department of Justice; the court of appeals remarked that the letter was written "independently" (Pet. App. 3a).

decided not to accept it. "There is, of course, no absolute right to have a guilty plea accepted. *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); [Fed. R. Crim. P.] 11. A court may reject a plea in exercise of sound judicial discretion." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Here, the agreement specifically envisioned that the court might not accept its terms and provided that in such an event petitioner would be allowed to withdraw his plea. The district court exercised that power, and petitioner received the remedy provided by the agreement.

In short, petitioner was treated in a way prescribed by the agreement's terms. It is true that the district court had the SEC letter before it when it rejected the plea agreement, but the court twice specifically stated that it decided to reject the agreement before it had even read the letter. There is no reason to question these statements by the court. Nor does petitioner suggest that the SEC deliberately attempted to sabotage the plea agreement.

Third, even leaving aside the district court's rejection of the agreement, and assuming that the government did breach it, a district court ordinarily has discretion in choosing remedies for a breach; it can either require specific performance or allow the defendant to withdraw his plea, depending upon which course it considers appropriate. See *Santobello* v. *New York*, 404 U.S. at 263. At least in the absence of any detrimental reliance by the defendant, there is no reason to require a district court to choose specific performance. Since petitioner was allowed to withdraw his plea, he is not entitled to any further relief.

To be sure, petitioner claims (Pet. 9, 26) that he did rely on the agreement to his detriment by beginning to make restitution and by cooperating with the receiver appointed to aid in making restitution. But when the district court announced that it would reject the plea agreement, petitioner's counsel specifically represented that such actions were

*not* taken in reliance on the plea agreement. Petitioner's counsel first suggested to the court that detrimental reliance might have occurred because petitioner had already cooperated with the restitution program (Pet. App. 47a-48a), but this colloquy followed (*id.* at 48a):

> THE COURT: Well, if he was sincere in the letter that he wrote to the Court, he would want to do that in any event.
>
> [PETITIONER'S COUNSEL]: Well, there's no question that he wants to do that in any event.
>
> THE COURT: Then he hasn't been prejudiced that I can see.

Having thus represented to the court — presumably in the hope of being treated leniently — that he undertook these actions voluntarily, and not in reliance on the plea agreement, petitioner cannot now claim the opposite.

b. Petitioner asserts (Pet. 21-22) that the court of appeals' decision conflicts with *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). In *Cooper*, the government offered a plea agreement but attempted to withdraw its offer before the defendant had communicated his acceptance; the court ordered specific performance of the agreement. But the fact that the Fourth Circuit, in *Cooper*, ordered specific performance of what it considered an executory plea agreement when the government explicitly attempted to repudiate that agreement entirely, does not mean that the Fourth Circuit would order specific performance in the quite different circumstances presented by this case.

Moreover, in *Cooper* the defendant was denied the benefits of the supposed plea agreement solely because of the government's actions. Here, by contrast, petitioner would not have received the benefits of the plea agreement no matter what the government had done, because the district

court itself decided to reject the agreement. Cf. *United States* v. *Hammerman*, 528 F.2d 326, 332 (1975) (Fourth Circuit gave defendant opportunity to withdraw his plea, and declined to order specific performance, because specific performance would have required sentencing judge to agree to a certain sentence). We note that the court in *Cooper* explicitly "confin[ed its] holding as narrowly as we may" (594 F.2d at 19), emphasized the particular facts of that case, and expressly contemplated that there might be circumstances in which its approach could not be applied (*ibid.*). See also *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980) (declining to follow *Cooper*); *Johnson* v. *Mabry*, 707 F.2d 323, 328 (8th Cir. 1983), petition for cert. pending, No. 83-328 ("The holding in *Cooper* was very narrow").[3]

2. Petitioner also urges (Pet. 32-36) that the district court did not impartially consider the information he offered at the sentencing proceeding. The only basis for this contention is the district court's remark, when asked about the role the SEC letter had played in its decision, that "I had made a decision to reject the plea agreement before even looking at [the letter] and had already made a decision as to what the sentence should be in this case if * * * the defendant decide[d] not to withdraw the plea of guilty" (Pet. App. 59a-60a; see page 3, *supra*).

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[3]Petitioner cites a number of other cases in support of his position (Pet. 21-23), but as petitioner's own descriptions of these cases show, in none did a court of appeals hold that a district court was required to order specific performance as a remedy for a breach of a plea agreement by the government after the district court determined that giving the defendant an opportunity to withdraw his plea would be an adequate remedy. See, *e.g.*, *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978) ("Where a plea agreement has not been honored by the Government, the fashioning of an appropriate remedy is largely a matter of the exercise of the sound discretion of the court.").

The court of appeals was clearly correct in concluding that "[w]hen read as a whole, the record indicates that the disputed remark was merely a response to [petitioner's] assertion of improper influence by the SEC letters, and not an admission that the judge was unalterably predisposed to the sentence [petitioner] received" (Pet. App. 10a). As the court of appeals noted (*id.* at 11a), the district court reviewed all the relevant reports and gave petitioner and his counsel an opportunity to speak at length before imposing sentence. The court of appeals' ruling on this point plainly does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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